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No. _____

In The

Supreme Court of the United States

ALLEN BREAUX
and
JOE AMBROGIO,

Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY
and RON HOLIFIELD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether retaliatory governmental actions that have the *effect* of punishing and inhibiting public employees' speech on matters of public concern can be insulated from First Amendment liability merely because of the *form* of the retaliatory action?

II. Whether a campaign of retaliatory harassment that is sufficiently severe, under the standard applied by the majority of the circuits, to chill a person of ordinary firmness from exercising First Amendment rights, can ever be insufficient as a matter of law to constitute an actionable First Amendment injury?

III. Whether a campaign of retaliatory harassment directed toward police officers, orchestrated by their superiors and motivated by the officers' speech on a matter of public concern (abuses of power within the Department), is too trivial to support a First Amendment cause of action when the adverse employment actions the officers suffered were: 1) a series of "trumped up" Internal Affairs charges; 2) repeated interrogations during one-sided "investigations" of the charges; 3) suspension following a "hearing" presided over by the Chief of Police, the primary culprit behind both the abuse of power reported by the officers and the retaliation; 4) defamatory public reprimands posted on the Department's "Wall of Shame" and disseminated to the media; 5) a 3½ day mental stability exam; 6) gag orders that continued even *after* the charges against the officers were "resolved" and that prevented them from defending their reputations; and 7) threats to terminate the officers in an attempt to pressure them to sign false confessions in the form of apology letters drafted by the Police Chief for their signature?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Allen Breaux and Joe Ambrogio, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 205 F.3d 150 (5th Cir. 2000). *See* Appendix, at 1. The judgment of the United States District Court for the Northern District of Texas is unreported. *See* App., at 33.

JURISDICTION

The judgment of the Fifth Circuit was entered on February 23, 2000. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution. It also involves 42 U.S.C. § 1983. The texts of these provisions appear in the Appendix, at 38.

STATEMENT OF THE CASE

(a) Statement of Facts

In the fall of 1992, Defendant Terry Hensley, who was then the Chief of Police for the City of Garland, Texas, initiated an investigation into the activities of several Garland City Councilmembers. (Record, Volume 21, at 181-83). Although the FBI was substantially involved in the matter, Hensley oversaw the investigation, telling the FBI agents which councilmembers and which of their activities to investigate. (21:183; 22:192). Garland's City

Manager, Defendant Ron Holifield, also played a significant role in the investigation, acting as a "confidential informant" to the FBI. (21:200-01). The investigation continued for more than two years but never led to any indictments. (21:221; 22:26, 181-82, 259, 268).

The councilmembers whom Hensley had investigated were politically aligned and included several political enemies of Hensley and Holifield. (21:183-85, 215-16; 22:24; Plaintiff's Exhibit 1 ("PX 1")). Hensley feared that he and Holifield would lose their jobs if one of their political enemies became the mayor. (23:41). From the beginning, the Garland police officers assigned to the investigation had doubts about whether it was properly motivated. (21:186-87, 190-91, 196-98, 201, 214, 216-17; 22:182-83). Commander Larry Wilson "didn't see any probable cause" for the investigation, and concluded that it "was initiated for the wrong reasons." (21:190; 22:28). In addition to Wilson, Lt. Jody Lay and Officer Joe Harn were concerned that the investigation was politically motivated. (21:213-14; 22:24).

In August 1992, Lt. Lay became the Supervisor of the Intelligence Unit. (25:114-15; 21:192-93). In that capacity, and at Hensley's direction, Lay acted as the leader of the political investigation into city councilmembers and served as liaison to the FBI. (21:192-93; 21:196). A few weeks after Lay assumed control of the Intelligence Unit, he took Plaintiff Allen Breaux for a truck ride. (25:128; 21:181; 25:126). Officer Breaux was a 19-year veteran of the Garland Police Department and had worked in the Intelligence Unit since the mid-1980s. (25:121-23). His supervisors regularly evaluated his performance as "outstanding." (21:164-175; PX 33,34). During the truck ride, Lay explained that the Intelligence Unit was going "to start doing political investigations" for Hensley and others. (25:129). Lay attempted to recruit Breaux for those investigations, but Breaux refused to participate in what he considered to be illegal investigations, and requested a transfer back to patrol. (25:128-31). When Hensley became aware of Breaux's principled opposition to

Hensley's political shenanigans, Hensley confronted Breaux, threw transfer papers in Breaux's face, and yelled, "So you don't want to be part of my Intelligence Unit, then get your ass out of my office." (25:133; 26:35-36). Hensley transferred Breaux to the worst shift on patrol, deep nights. (25:133; 22:134).

For the next year and a half, Breaux worked as a patrol officer and did not hear anything more about the political investigations. (25:135). Nor did he inquire about them due to fear he would be fired. (25:134). In January 1994, however, Breaux was elected vice-president of the Garland Police Officers' Association ("GPOA"). (DX 35, Response 1; DX 38, Response 1). Breaux then confided in the newly elected President of the GPOA, Detective Joe Ambrogio, that Lay had attempted to recruit him to participate in political investigations. (24:138).

By the Spring of 1994, police department morale was extremely low, (21:201-02), and the GPOA decided to conduct a survey of all department employees in an effort to identify problems and recommend solutions. (25:139). The GPOA intended to present the information to Hensley and hoped that he would work with them. (25:139). When Hensley learned about the survey, however, he became very angry, summoned Ambrogio to his office, and made vulgar, abusive remarks. (24:135, 142; 21:202; 22:56-57). When Ambrogio tried to leave, Hensley blocked his exit and threatened to fire Ambrogio if the survey hurt or embarrassed Hensley. (23:24; 24:156-57).

Holifield was also displeased with the survey. (22:56). On March 9, 1994, the day after Hensley's confrontation with Ambrogio, Holifield ordered every officer on the GPOA board to report to his office. (21:202; 24:136). Holifield criticized the GPOA and threatened to "destroy" it if it acted politically, (25:143; 24:141), claiming that he wanted to keep politics out of the Department. (24:137; 25:144). Reacting to the discussion about keeping politics out of the Department, Breaux informed Holifield that Lay had tried to recruit him to conduct political investigations. (21:203; 24:137; DX 210, at 13-14). After

Breaux raised the issue of political investigations, Holifield jumped to his feet, shut his office door, and told the officers he "wanted the topic of political investigations to remain confidential." (24:140; 25:143). Then, immediately after the March 9 meeting, Holifield alerted Hensley that Breaux was talking about the political investigations. (23:25). From that point on, Breaux (and later, Ambrogio) became the target of intense retaliation orchestrated by Hensley and Holifield. (21:203; 25:162-63; 26:23-24).

The Retaliation – After being informed by Holifield that Breaux had reported the political investigations during the March 9 meeting, Hensley filed an Internal Affairs charge (#94-12) against Breaux, accusing him of making false statements while conducting city business. (23:29-30; PX 57). On April 18, 1994, Holifield filed a second Internal Affairs charge (#94-13), accusing Breaux, Ambrogio, and the other GPOA board members of stealing film from a hidden video camera in Holifield's office. (23:35-37; 25:146; PX 65, 66, 67; DX 29, 2). The alleged "theft" came to Holifield's attention on March 28, during a meeting with Hensley and others in Holifield's office. The officer responsible for changing the film in Holifield's camera came in to check the film and found the camera empty. (23:38-39; 26:76-77). Holifield noted that the GPOA board members had been in his office during the meeting on March 9, and decided to formally accuse them of theft. (26:78). No other evidence linked the GPOA board members to the "theft," and no evidence suggested that there had even been a theft (as opposed to a simple failure to put film in the camera). (23:220-21). Nevertheless, the GPOA board members were not only formally accused of theft, they were placed under a gag order. (23:35-37; 25:146; PX 29, 65, 66, 67; DX 2).

The Internal Affairs investigation of the charges was overtly one-sided. The investigation of Charge 94-12, which accused Breaux of lying to Holifield about Lt. Lay recruiting Breaux to do political investigations, consisted of repeated interrogations of Breaux, who was also

required to submit several written statements. (23:31-32; PX 58, 59, 60, 62, 79, 138, 139, 140). Meanwhile, Lt. Lay was never even interviewed. (23:33-34; DX 1). As to Charge 94-13, the "trumped up" theft charge, all of the GPOA board members were required to give written statements and oral interviews. (25:149; PX 68-72, 80, 144-45; DX 2, Atts. 7,10,13,16,17,20,23,26,29,32,33; DX 64-66, 76). Although many other persons had been in Holifield's office during the relevant period, nobody was investigated for stealing the film except the GPOA board members. (24:33; 23:235-37, 239; 21:212-13).

The investigation uncovered no evidence that *any* police officer had stolen film from Holifield's camera (23:220-21), and Lay wondered whether any film was even missing, or whether the officer responsible had simply forgotten to load the camera. (22:184; 23:37-38). Moreover, Hensley admitted that, at the time the theft charge was filed, no evidence indicated that any police officer had stolen the film. (23:220-21). The primary motivation for pursuing these "trumped up" charges was Defendants' anger about the GPOA survey and their continued sensitivity about Breaux's allegations of corruption. (21:207; 22:189; 23:232-33). Commander Wilson put it succinctly: "[T]hat allegation was made to keep them [Breaux and Ambrogio] quiet." (21:209).

After being accused of theft in Charge 94-13, Ambrogio contacted CLEAT (Combined Law Enforcement Associations of Texas) and requested an attorney. (25:100-01; 24:143; 25:136). The attorney, Bob Hasty, advised Ambrogio to issue a press release, call a press conference, and demand an outside investigation. Ambrogio followed Hasty's advice. (24:143, 145). The press release, which was issued jointly by the GPOA and CLEAT, called for an independent investigation into "public corruption within the police department." (24:169; DX 123). At the press conference, both Hasty and Ambrogio requested an independent inquiry to determine whether the Department

contained a secret intelligence unit that investigated persons "who oppose this current administration." (23:150-51; 24:146).

After the press conference, Hensley brought yet another Internal Affairs Charge against Ambrogio (#94-14), (24:146-47; DX 3, Att. 3), accusing him of "conduct resulting in justified [sic], unfavorable criticism of the Department," conduct that would "embarrass, humiliate or shame another," and "insubordination." (DX 75). Once again, Ambrogio was subjected to numerous interrogations and was required to give several statements. (PX 76-77, 80-82, 144-45).

At the conclusion of the Internal Affairs hearings on the charges against the Plaintiffs, Hensley sustained Charge 94-12 against Breaux and Charge 94-14 against Ambrogio. (21:207; PX 140, p. 080130; PX 145, p. 090223-25; DX 73). Hensley suspended Breaux, ordered him to surrender his gun and badge, and placed him on administrative leave. (25:154-55; 23:209; PX 5, p.3; PX 140, p.39). Hensley also imposed an unprecedented continuing gag order on Breaux and Ambrogio, and threatened them with additional charges of insubordination if they discussed their side of the events with anyone. (23:44-45, 217-18).

In a further effort to destroy Breaux's credibility, Hensley ordered him to undergo a mental stability evaluation. (25:155-56; PX 87). Breaux was subjected to three and one-half days of evaluation by a psychologist. (25:156). The psychologist found that, although Breaux was suffering from "situationally-related stress" at work, his thinking was "free of distortions in perception," and he was "capable of appropriate judgment" and "fit for duty." (25:156; PX 89, p.2). Despite widespread knowledge within the Department that Hensley had ordered this exam, Hensley made no effort to publicize the favorable result.

To further penalize Breaux, Hensley publicly reprimanded him by posting a memorandum throughout the Department attacking Breaux's character, credibility, and competence. (23:46-47, 49-55, 57-59, 84; PX 5). The memorandum, which Hensley issued under his signature, stated that Breaux was guilty of "making false and irresponsible statements," and concluded, "Officer Breaux's allegations are completely without basis in fact." (23:46-47, 49-50; PX 5). The patrol display board, one of the places Hensley posted the memorandum, became known among the officers as the "Wall of Shame." (25:157-58). Hensley made the memorandum available to the press and told reporters that Breaux lied in his report of suspected misconduct. (23:60, 64). The lead story in the Garland Section of the DALLAS MORNING NEWS on May 6, 1994 bore the headline "Police Chief Says Officer Lied," and the article specifically named Allen Breaux. (DX 1, pp. 080203-04). Although reporters telephoned Breaux, Hensley's gag order prevented Breaux from defending himself. (25:157).

In May 1994, Hensley also posted on the "Wall of Shame" a memorandum addressed to all Department personnel announcing that he had sustained various charges against Ambrogio arising from the press conference. (23:58-59; PX 7). The memo stated that Ambrogio was guilty of making "numerous false allegations" and that "Ambrogio had no evidence to support the allegations." Hensley also told a reporter from the DALLAS MORNING NEWS that Ambrogio's statements were lies. (23:64). Ambrogio felt that he was "at the end of [his] rope," and that he would be fired at any moment because of the trumped up investigations. (22:28, 24:162, 172). When he walked down the hall, people ducked into rooms to avoid him like he "had the plague." (24:154). Fellow officers on the SWAT team, with whom he worked in life-and-death situations, now had doubts about him. (24:150).

Finally, in mid-May 1994, Hensley attempted to pressure the Plaintiffs into recanting their reports of Hensley's politically motivated investigations. Hensley

drafted an apology letter for Breaux's signature, then called Breaux into his office and pressured him to sign it. (23:62-64; 25:175; PX 6). The letter stated, "I now know there was no evidence for any of the allegations I made," and required Breaux to admit that he had raised concerns about the political investigations because of emotional problems resulting from his service in Vietnam. (23:62-64; PX 6). Hensley told Breaux that, by signing the letter, Breaux would avoid termination and could retire early with full benefits. (23:75-76, 78-79; PX 6). Hensley also attempted to persuade Ambrogio to sign a similar apology letter, in which Hensley tried to make Ambrogio admit that he "made serious mistakes and misjudgments," that "none of the accusations [about the political investigations] were true," that he made those accusations to "make Chief Hensley and Lieutenant Lay look bad," and that he was "guilty of all the things that the Chain of Command Board said I did." (23:65-72; PX 8). Hensley told Ambrogio that if he would sign the letter and accept a 20-day suspension, he could save his job. (23:75-76, 186-87; PX 145, at 090223-24). Hensley also warned Ambrogio that if he did not sign the letter, "all things were possible, including indefinite suspension," which is the same as termination. (23:84, 187). Despite these threats, both Breaux and Ambrogio stood by their principles and refused to sign the letters. (24:161-62; 25:175). Hensley assuredly would have fired both officers had he not been replaced as Police Chief in early June 1994, following the election of a new mayor.[1]

This entire ordeal of false charges, one-sided investigations, repeated interrogations, hearings with foregone

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[1] Although Breaux and Ambrogio narrowly avoided termination, the retaliation orchestrated by Hensley continued to adversely affect their careers. Hensley effectively had turned the officers into "pariahs" with little hope of career advancement. Indeed, Hensley's successor – an ally of Hensley – transferred Breaux to the Telephone Reporting Unit, a desk job staffed principally with civilians. (22:40; 25:178).

conclusions, suspensions, gag orders, mental instability exams, public reprimands, defamatory publicity, and threats to terminate unless the officers recanted in writing, was, in the view of Commander Wilson, "done to stop the accusations that were being made" by Plaintiffs. (21:207). According to Wilson, "this was Terry Hensley's way of fighting back." (21:207). Garland's Mayor, James Ratliff, who conducted his own inquiry into these matters after he took office in May 1994, concluded that "Officer Breaux and Detective Ambrogio were wronged by the Garland Police Department." (22:77). Mayor Ratliff's handwritten notes reveal that he was "outraged that a number of senior officers in the Garland Police Department were prepared to allow two innocent officers to take a fall for making public what appeared to be an illegal investigation . . . [I]nstead of condemnation, they should be getting a public apology and thanks." (22:66).

(b) Course of Proceedings and Dispositions

As a result of this series of retaliatory actions, Breaux and Ambrogio filed suit against Hensley, Holifield, and the City of Garland, in the Northern District of Texas, Dallas Division, alleging violations of 42 U.S.C. § 1983.[2] Federal jurisdiction over this lawsuit was premised on 28 U.S.C. § 1331. Following trial, the jury found Hensley and Holifield individually liable under § 1983 and ordered them to pay actual damages in excess of $500,000, and further ordered each of them to pay $5,000,000 in punitive damages to each Plaintiff. (15:1762-65). The court entered judgment on the verdict but, in responding to various post-judgment motions, reduced the actual damages, proportionally reduced the punitive damages, and

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[2] The district court granted the City summary judgment on the § 1983 claim on the ground that neither Hensley nor Holifield possessed "final policy-making authority" for the City regarding the matter of police officer employment decisions. (14:1556-69).

required a remittitur from the Plaintiffs. (20:2152-77). After accepting the remittitur, Breaux and Ambrogio were awarded, jointly and severally from the Defendants, $6,258.75 and $2,256 respectively for lost income, and severally from each Defendant, $150,000 for lost reputation, $50,000 for mental anguish, and $2,000,000 as punitive damages. (20:2183-87).

The Fifth Circuit reversed the District Court's judgment on the ground that the retaliation suffered by the Plaintiffs was not sufficiently severe to inflict a constitutional injury. App. 14-22. According to the Fifth Circuit, Hensley and Holifield's vendetta against Breaux and Ambrogio did not rise to the level of an "adverse employment action." App. 22. Explaining that federal courts should not become enmeshed in "relatively trivial matters," the Fifth Circuit declined to view governmental retaliation as actionable just because it has the effect of chilling the exercise of free speech. App. 15. Readily apparent from the court's discussion is its conviction that some forms of governmental retaliation against public employee speech are "relatively trivial" despite their success in achieving an inhibiting and chilling effect on the free exercise of First Amendment rights. *See id.* Focusing more on the *form* of retaliation than the substantive *effect* of the retaliation, the Fifth Circuit set down a short, relatively inflexible list of actionable adverse employment actions, consisting of discharges, refusals to hire, demotions, refusals to promote, reprimands, and transfers that effectively amount to demotions. *See* App. 14-15. Then, instead of assessing the overall punitive and chilling effect of the totality of the retaliatory actions aimed at Breaux and Ambrogio, the Fifth Circuit examined each action in isolation, mechanically concluding that none of the various forms of retaliation was on the Fifth Circuit's short list of actionable adverse employment actions. *See* App. 15-21.

Specifically, the panel in *Breaux* ruled that the false charges were not an "adverse employment action" amounting to a constitutional deprivation because Fifth

Circuit precedent indicated that false charges are not on the Fifth Circuit's short list of adverse employment actions. App. 15-16. The one-sided investigations, including repeated interrogations of Breaux and Ambrogio, were not "adverse employment actions" because investigations are not on the Fifth Circuit list. *Id.* The ordering of Breaux to undergo a mental instability exam was deemed insufficiently adverse because psychological testing is not on the list. *See id.* The suspension of Breaux and the defamatory public reprimands of both Breaux and Ambrogio gave the panel a bit more pause, because "reprimands" *are* included on the Fifth Circuit's list of actionable "adverse employment actions." App. 15-17. Nevertheless, the panel characterized the suspension as mere "administrative leave" that resulted in no loss of pay. App. 16. The official reprimands that went on Breaux and Ambrogio's permanent records ceased to be actionable "reprimands" because they were subsequently "rescinded" by a later Police Chief. App. 17.[3] As to the reputational damage that the jury found was caused by Hensley's wide publication of the false charges and reprimands, the panel explained that reputational damage cannot be an "adverse employment action," App. 17-18 n.14, relying inappropriately on *Paul v. Davis*, 424 U.S. 693 (1976).[4] As to the threats of termination unless Breaux

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[3] Because of the Fifth Circuit's mechanical approach to the "adverse employment action" issue, it did not address the punitive and chilling impact that the reprimands had on speech during the time before those reprimands were rescinded. Nor did it address how a public reprimand can be effectively "rescinded" when the rescinding is done quietly and without any attendant publicity, either in the Department or in the media.

[4] *Paul v. Davis* held only that injury to reputation alone does not deprive an individual of a "liberty" or "property" interest under due process analysis. 424 U.S. at 712. The First Amendment, by contrast, as this Court has consistently ruled since *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), can be

and Ambrogio recanted their speech, the Fifth Circuit ruled that threats of dismissal are simply "hot air" that is incapable of chilling constitutional rights because employees should know that *Pickering v. Board of Education*, 391 U.S. 563 (1968), permits them to bring a lawsuit should they actually *be* terminated. App. 19-20.[5] Finally, the panel explained that the totality of Defendant's campaign of retaliatory harassment was not actionable because it did not amount to a *constructive* adverse employment action, essentially because Ambrogio and Breaux were neither fired nor effectively "demoted." App. 21-22.

In sum, even though the Fifth Circuit acknowledged that the jury could reasonably find that Defendants undertook their adverse actions *because of* Plaintiffs' truthful speech on a matter of public concern, App. 13, 14 n.11, and further that there was no legitimate workplace justification for the actions sufficient to outweigh Plaintiffs' speech interests, App. 13 & n.10, the Plaintiffs' lawsuit was ruled fatally devoid of an "adverse employment action" because they had not technically suffered discharge, demotion, denial of promotion, reduction in pay, or lost seniority as a result of their speech. App. 14, 22. The court found no other reversible error. *See* App. 2, 11 n.8, 32.

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violated by retaliatory governmental actions that deprive public employees of benefits that are not themselves of constitutional magnitude, so long as the damage was inflicted *because of* employees' exercise of First Amendment rights.

[5] The Fifth Circuit explained that *Pickering* involved an *actual* termination, and that this Court's crucial references in *Pickering* to *threats* of termination were really addressing a pre-*Pickering* era. App. 20. According to the Fifth Circuit, public employees threatened with termination after *Pickering* should be comforted that such threats cannot be backed up, and should feel free to continue their First Amendment activity, confident in the knowledge that they can file a lawsuit if they get fired. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Analysis of "Adverse Employment Action" in *Breaux* Stands in Direct Contravention of this Court's Settled View That Public Employees Suffer Actionable First Amendment Injury When Governmental Retaliation – No Matter What Mode of Retaliatory Weapon the Government Selects – is Sufficiently Severe to Penalize and Inhibit Their Exercise of First Amendment Rights.

At the very heart of the First Amendment is the principle that the government may not prohibit or penalize speech that is critical of how governmental power is exercised. *See Texas v. Johnson*, 491 U.S. 397, 414-20 (1989); *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). In a democratic society, where the people decide who to put in power and thereby act as a check on abuses of that power, it is essential that the people be permitted to engage in a robust exchange of ideas in order to promote more informed self-government. *See Connick v. Myers*, 461 U.S. 138, 145 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 571-72 (1968). Indeed, the Court considers these core First Amendment ideals so paramount that – in sharp contrast to any other constitutional guarantee – even individuals who have suffered no cognizable First Amendment injury are given standing to challenge a statutory prohibition on the ground that it threatens to penalize and thereby "chill" the First Amendment rights of others. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-13 (1973). The Court has consistently justified such "special treatment" on the ground that substantial damage to First Amendment values is caused by the mere threat of punishment (as long as it is a realistic threat) and, consequently, has treated the "chilling effect" of potential governmental punishment to be the hallmark of First Amendment "injury." *Gooding*, 405 U.S. at 521; *Broadrick*, 413 U.S. at 612-13.

Although the "chilling effect" condemned by the Court typically arises from the punitive actions of government *as sovereign*, the Court has similarly condemned punitive governmental activity – even when pursued in its role *as employer* rather than sovereign – that inhibits, or "chills," the exercise of core First Amendment activity by public employees. *See, e.g., Pickering*, 391 U.S. at 572-74; *Connick*, 461 U.S. at 145. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Court rejected the notion that the government, acting in its role as employer, can accomplish indirectly, by denying benefits to its employees, what it cannot command directly when acting in its role as sovereign. Thus, even though a public employee may not have a right to a particular job benefit, there are some bases upon which the government may not deny the employee that benefit. *See id.* Under *Perry*, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech." *Id.*

The rationale for the Court's holding in *Perry* is the very same "chilling" concern that has consistently informed the Court's First Amendment jurisprudence: "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, *his exercise of those freedoms would in effect be penalized and inhibited.*" *Id.* (emphasis added). Moreover, because governmental employees are often in the best position to detect governmental abuses, inefficiency, or waste, the Court has emphasized that such individuals must be able to speak freely on matters of public concern. *See Pickering*, 391 U.S. at 572; *Board of Commissioners v. Umbehr*, 511 U.S. 668, 674 (1995); *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality). Thus, governmental retaliation that is sufficiently severe to inhibit or "chill" public employees' speech on matters of public concern – whether the retaliation specifically deters the target of the retaliation or generally deters other employees from speaking on matters of public concern – is of paramount

First Amendment significance. *See Pickering*, 391 U.S. at 572-74; *Umbehr*, 518 U.S. at 674.

The only material difference in how the Court has treated speech restrictions imposed by the government in its role as employer and speech restrictions imposed by the government in its role as sovereign is that the government can more readily *justify* restrictions on the First Amendment rights of its employees, at least where an employee's First Amendment activities truly undermine his ability to perform his particular job effectively and efficiently. *See Pickering*, 391 U.S. at 568. Thus, the Court explained in *Pickering* that "[The] State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in [regulating] the speech of the citizenry in general." *Id. Pickering* therefore instructs courts to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* Notably, there is no suggestion in *Pickering* – or any other of the Court's precedents – that the threshold for establishing an *injury* of First Amendment magnitude is *higher* for a public employee than for any other citizen. Indeed, the *Pickering* balance suggests otherwise – that the only "break" the government receives when acting as employer is that it has readier means to justify an infringement of public employees' First Amendment interests.

Viewed in light of these core First Amendment doctrines, the damage done to the First Amendment by the Fifth Circuit's ruling in *Breaux* is immense. The severity of the retaliation against Officer Breaux and Detective Ambrogio was certainly sufficient to penalize and inhibit their criticism of what reasonably appeared to be a blatant misuse of governmental power, and was additionally sufficient to muffle the voices of other officers in the Garland Police Department, who "got the message" that there would be a stiff price to pay for expressing concern

about Chief Hensley's use of the department to investigate his political enemies. Moreover, the retaliatory and punitive actions taken by Hensley and Holifield were pursued with the very *purpose* of penalizing, and thereby inhibiting, speech on a matter of vital public concern.

The Fifth Circuit's analysis confuses the *cause* of the injury with the actual First Amendment *injury*. An adverse employment action might *cause* a First Amendment injury; but it cannot *be* the First Amendment injury, because there is no First Amendment right to public employment or to any particular condition or benefit of employment. The First Amendment rights of public employees are not infringed unless the government undertakes adverse employment actions *because of* employees' speech on matters of public concern. *See Perry*, 408 U.S. at 596-98. It is only when public employees suffer adverse actions *because of* First Amendment activity that their First Amendment rights are unconstitutionally penalized and inhibited. *See id.* at 597. Thus, it is the punitive and inhibiting *effect* of the government's retaliation – and not any particular *mode* of retaliation – that constitutes the essence of the injury and that, without which, there would be no First Amendment claim. The Fifth Circuit's decision, however, elevates form over substance by inappropriately focusing on the *mode* of retaliation selected by the governmental employer rather than on the purpose and effect of that retaliation.

This focus leads to an untenable result that runs dramatically counter to this Court's First Amendment jurisprudence: A governmental employer may purposefully retaliate against a public employee's speech on matters of public concern, without any legitimate justification, effectively punishing and thereby inhibiting that employee's speech, as well as sending a "chilling" message to other employees, as long as the government carefully chooses its retaliatory weapons from among those the Fifth Circuit has expressly approved. Indeed, public entities desiring to retaliate against employees because of

those employees' exercise of speech or associational rights need only refer to the Fifth Circuit's *Breaux* opinion for a blueprint on how to engage in ill-motivated and unjustifiable retaliation without incurring any liability. With *Breaux* as a guide, governmental agencies can deliberately penalize, inhibit, and chill public employees' speech on matters of public concern, and can do so with impunity.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73, 79 (1990), the Court clearly established that the key to a public employee's First Amendment retaliation claim is not the *form* of the retaliation but rather its *effect* – *i.e.*, whether the retaliatory actions "chill the exercise of protected [activities] by public employees" or "pressur[e] employees to discontinue the free exercise of their First Amendment rights." Although *Rutan* was a patronage case in which employees were being penalized for their political beliefs and associations rather than for their speech on matters of public concern, *Rutan*'s reasoning is equally applicable to governmental retaliation against employee speech – particularly with respect to the issue of how severe the retaliation must be before First Amendment injury is inflicted.[6] The Seventh Circuit in *Rutan* had ruled that only those retaliatory employment decisions that are the "substantial equivalent of dismissal" can violate a public employee's First Amendment rights. 497 U.S. at 75 (citing 868 F.2d at 954-57). This Court rejected the Seventh Circuit's formulation precisely because – as in the present case – it arbitrarily focused on the *form* of governmental retaliation rather than on whether the

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[6] If anything, the threshold of severity should be higher in the "patronage" context than in the "speech" context, given that adverse employment activity motivated by patronage arguably *serves* First Amendment ideals by facilitating elected officials' ability to carry out the policies favored by the electorate. *See Elrod v. Burns*, 427 U.S. 347, 367, 371-72 (1976). Thus, in patronage cases, there are countervailing First Amendment-related interests on the government's side of the balance.

retaliation, of whatever form, was sufficient to produce the constitutionally proscribed chilling and inhibiting effect. *See Rutan*, 497 U.S. at 75. Accordingly, the *Rutan* Court explained: "We find [the Seventh Circuit's] test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy." *Id.* The Court further emphasized that the critical question "is not which penalty is more acute, but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights." *Id.* at 79.

The Fifth Circuit's decision in *Breaux* is utterly at odds with *Rutan*. The question is *whether* the governmental retaliation produced an environment antithetical to the free exercise of First Amendment rights, not *how* the government produced that environment. Throughout the *Rutan* opinion, this Court repeatedly described the First Amendment injury in reference to the effect the retaliation would have on public employees' ability to exercise their rights rather than on the form or mode of the retaliation itself. 497 U.S. at 69-79. Thus, the Court acknowledged the First Amendment significance of retaliatory employment actions that "chill," "burden," "inhibit," "constrain," "encroach on," "interfere with," "infringe" or "impede" public employees' exercise of First Amendment freedoms, as well as those retaliatory actions that "pressure," "coerce," "obligate," or "press" public employees to discontinue exercising those rights. *Id.* at 69, 70, 73, 74, 75, 76, 77, 79.

Rutan's emphasis on the chilling effect of governmental retaliation, rather than on the *means* chosen to accomplish that effect, makes perfect sense given that public employees are always required to prove that the adverse employment actions were undertaken with the motive of retaliating against the employee because of the employee's exercise of First Amendment rights. *See Umbehr*, 518 U.S. at 675. If the *purpose* of the adverse

employment action is to retaliate against, and thereby penalize and inhibit, the exercise of First Amendment rights – and if the retaliation has that *effect* – it makes no sense to require that the employee additionally establish that the government produced this First Amendment damage by some particular *means*. The clever choice of means cannot justify the end. But under the Fifth Circuit's approach, as long as the government chooses its weapons from that court's list of approved tactics, it may freely retaliate with the overt purpose of chilling speech on matters of public concern, and may successfully effectuate its impermissible objectives with impunity.

Significantly, this Court in *Rutan* condemned even the least harsh of the challenged employment actions – the denial of promotions, and the denial of one employee's request for a transfer so he could work closer to home. *Id.* at 67, 73. According to the Court, "Employees who find themselves in dead-end positions due to their political background *are* adversely affected." *Id.* at 73 (emphasis in original). Additionally, "[e]mployees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so." *Id.* The Court concluded, "[t]hese are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment." *Id.* at 74. Indeed, *Rutan* further noted that the First Amendment protects public employees from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Id.* at 76 n.8 (quoting 868 F.2d at 954 n.4).

More recently, in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 457 (1995), the Court held that § 501(b) of the Ethics in Government Act, which prohibits certain governmental employees from accepting an honorarium for making speeches or writing articles, constitutes an unconstitutional infringement on public

employees' expressive activities. Even though the honoraria ban did not prevent public employees from writing or speaking, and even though it affected employees only when they were engaged in activities outside the workplace, the Court nevertheless characterized the ban as a "significant burden on expressive activity" because it denied the covered employees an "incentive toward more expression." *Id.* at 468-69. When the government was unable to justify the inhibiting effect of the honoraria ban on public employee speech, such as by pointing to overriding governmental workplace needs, the Court declared the ban unconstitutional. *See id.* at 470, 477.

The governmental retaliation in the present case penalized and inhibited speech far more than the long commute in *Rutan* or the honoraria ban in *Treasury Employees*. Breaux and Ambrogio were the targets of a continuing campaign of retaliatory harassment orchestrated by their superiors, which included: 1) trumped up Internal Affairs charges, usually filed on the "spur of the moment" while in immediate anger about Plaintiffs' accusations of abuse of power, rather than as the result of any reflective, deliberative process; 2) one-sided investigations of those charges, marked by repeated interrogations of the Plaintiffs and the failure even to interview others whose information was obviously relevant, and in the case of the film "theft," the refusal to investigate other possible suspects; 3) gag orders that not only prohibited Plaintiffs from telling their side of the events during the "investigation" of the Internal Affairs charges, but which continued even after the adjudication of those charges; 4) "Kangaroo court" hearings with Hensley in the role of ultimate fact-finder and sentencer; 5) the suspension of Breaux as a result of Hensley sustaining the charges; 6) the requirement that Breaux undergo mental stability testing; 7) defamatory public reprimands of both Breaux and Ambrogio, posted on the Department's "Wall of Shame," and disseminated to the press; and 8) threats to

terminate the Plaintiffs unless they signed false confessions composed by Hensley in the form of apology letters. Although it may be possible to conceive of additional ways that Breaux and Ambrogio's superiors could have retaliated against them, perhaps even ways of still increasing severity, the retaliatory weapons chosen by the Defendants were certainly sufficiently punitive and chilling to support a First Amendment claim under this Court's precedent.[7]

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[7] That retaliation is sufficiently severe to support a First Amendment cause of action does not mean that the degree of retaliatory severity is never of further consequence. Quite to the contrary, there are a number of ways that relatively less severe forms of retaliation remain relevant in this Court's analytical framework for resolving First Amendment claims of public employees. This framework is set forth in *Umbehr*. 518 U.S. at 675-76. *First*, because the First Amendment's guarantee of freedom of speech protects governmental employees only from adverse actions taken *because of* their speech on matters of public concern, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. *See id.* at 675. The severity of the adverse employment action is plainly relevant to this inquiry: the more routine the adverse action, the less likely it is to be viewed as "retaliatory." *Second*, even when the government has taken an adverse action *because of* protected speech, the adverse action may be justified by pointing to countervailing governmental interests that are sufficiently strong to outweigh the employee's free speech interests. *See id.* at 675-76 (citing *Pickering*, 391 U.S. at 568). Under this "balancing," relatively minor adverse actions will be more easily justified as impinging on employee speech only as much as necessary to serve legitimate workplace needs. And *third*, if the employee ultimately establishes that the employer has violated his First Amendment rights, the lack of severity of the adverse employment action is relevant to the amount of both compensatory and punitive damages.

In sum, the existing legal framework for adjudicating public employee First Amendment claims already factors in – at every step of the analysis – the relative severity of adverse

II. The Fifth Circuit's Analysis in *Breaux* Reflects a Split in the Circuits, the Majority of Which Determine the First Amendment Significance of Governmental Retaliation According to an Objective "Chilling" Standard.

The circuits have taken several divergent approaches to the issue of whether governmental retaliation aimed at public employees' exercise of First Amendment freedoms is sufficiently severe to be actionable. There have been essentially four different approaches, listed here in increasing degrees of severity:

1. The wide open "any discipline" approach;
2. The "objectively chilling" standard;
3. The restrictive short list of actionable employment actions approach; and
4. The "substantial equivalent of dismissal" test.

"Any discipline": Under this nonrestrictive approach, even an employee who suffers relatively minor adversity has a claim as long as the adversity was applied in retaliation for the employee's exercise of First Amendment freedoms. *See, e.g., Lieberman v. Reisman*, 857 F.2d 896, 900 (2nd Cir. 1988) ("[W]henever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns."); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987) ("[T]he constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech."); *Waters v. Chaffin*, 684 F.2d 833, 837 n.9 (11th Cir. 1982) ("The First Amendment is implicated whenever a government employee is disciplined for his speech.").

The "Objectively Chilling" Standard: Under this approach, a public employee who suffers governmental retaliation for the exercise of First Amendment rights has a

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employment actions. Consequently, the Fifth Circuit's "all or nothing" approach serves no necessary function, and will prevent many deserving public employees from having their day in court.

claim as long as the retaliation would be sufficient to deter (or chill) a person of ordinary firmness from continuing to engage in First Amendment activity. *See, e.g., Agosto de Feliciano v. Aponte Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989) (recognizing, in a patronage case, that a cause of action exists "where the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations in favor of the prevailing party"); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3rd Cir. 2000) (relief appropriate when retaliation is "sufficient 'to deter a person of ordinary firmness' from exercising his First Amendment rights."); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) (plaintiff must establish "that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in [constitutionally protected] activity"); *Piecynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989) ("Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs."); *Allen v. Scribner*, 812 F.2d 426, 434 n.16 (9th Cir. 1987) (plaintiff's reassignment "might have had an impermissible chilling effect on his constitutionally protected speech") & n.17 ("While the individual incidents of verbal intimidation and abuse may seem insubstantial, we cannot say as a matter of law that the exercise of First Amendment rights was not deterred."); *Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992) (The First Amendment protects against "any adverse employment action taken by the employer that is likely to chill the exercise of constitutionally protected speech"); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (approving of and applying a "likely to chill" standard).

The Restrictive Short List of Actionable Employment Actions Approach: The Fifth Circuit's approach, as evidenced by its application in *Breaux*, is somewhat difficult to label. On one hand, it appears to be a case-by-case

assessment of the severity of the retaliation at issue, similar in that regard to the approach of those circuits using the "objectively chilling" test. But *Breaux* makes clear that the propensity of the retaliation to deter or chill speech is not by itself sufficient to support a First Amendment claim in the Fifth Circuit. App. 15. It is at this point that the Fifth Circuit's approach begins to operate more like a *per se* rule, restricting actionable retaliation to a short list of the most severe forms of adverse employment actions – discharge, demotion, failure to promote, official reprimand (but only if the reprimand is never rescinded), and transfer (but only if the transfer is a constructive demotion). *See* App. 14-16, 22.[8]

The Substantial Equivalent of Dismissal Test: Under this approach, public employees have a cause of action only if they are actually or constructively discharged. *See, e.g., Delong v. United States*, 621 F.2d 618, 623-24 (4th Cir. 1980).

Of these four approaches, only two are viable in light of this Court's opinion in *Rutan*. After *Rutan* rejected the Seventh Circuit's use of the "substantial equivalent of dismissal" test in a patronage case, the Fourth Circuit understandably construed *Rutan* as foreclosing its use in any case involving governmental retaliation against public employees' exercise of First Amendment activities. *See DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995). Since *Rutan*, the Fourth Circuit has been moving in the direction of the "objectively chilling" standard. *See ACLU v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993). Moreover, *Rutan*'s approach to the requisite severity of an adverse employment action, as well as its reasoning, is squarely at odds with the Fifth Circuit's rigid and restrictive "short list" of actionable employment actions. As explained in more detail in Argument I of this Petition, the Fifth Circuit

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[8] Essentially, by interpreting "adverse employment action" as if it were a statutory term of art, with a particularized, narrow, and rigid meaning, the Fifth Circuit has imposed a "Title VII-like" requirement on First Amendment litigants.

approach elevates the *form* of the retaliation over *Rutan*'s emphasis on the substantive effect the retaliation has on the free exercise of First Amendment freedoms.

Only the two least restrictive tests – the "any discipline" approach and the "objectively chilling" standard – can claim to be consistent with *Rutan*. And only these two least restrictive tests permit a cause of action every time there is significant damage done to First Amendment values. Although the "any discipline" approach establishes no severity threshold, this approach finds support in the "birthday party illustration" in footnote 8 of *Rutan*. *See* 497 U.S. at 76 n.8 (noting that the First Amendment protects employees from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.") Moreover, as explained in footnote 7 of this Petition, there are several stages of the *Pickering* analysis where employers can successfully avoid paying heavy damages, or avoid liability altogether, by pointing to the relative triviality of the adverse action(s) that provoked the lawsuit. These existing hurdles to any substantial recovery for minor forms of retaliation will provide a practical deterrent to the "trivial" lawsuit.

Yet, setting aside *Rutan*'s "birthday party" illustration, the "objectively chilling" standard, by focusing on the substantive effect of the retaliation rather than on the form of the retaliation, appears precisely in line with this Court's traditional position that First Amendment injury occurs when governmental actions penalize, inhibit, and chill the free exercise of core First Amendment freedoms. By requiring retaliation that is sufficiently severe to deter a person of ordinary firmness from freely exercising his First Amendment rights, the standard is neither overinclusive nor underinclusive in identifying injury of First Amendment significance. By providing a cause of action whenever governmental retaliation is objectively sufficient to undermine First Amendment values, the "objectively chilling" test avoids the arbitrary underinclusiveness fatal to both the Fifth Circuit's rigid short list and the "substantial

equivalent of dismissal" test rejected in *Rutan*. At the same time, the "objectively chilling" test avoids overinclusiveness by ensuring that employees with unusually fragile psyches will not be able to "make a federal case" out of trivial, albeit retaliatory, responses to their First Amendment activity.

Had the *Breaux* case arisen in any other circuit, the retaliation suffered by the Plaintiffs would have been sufficient to constitute a First Amendment injury and support an award of damages. The series of retaliatory actions endured by Breaux and Ambrogio indisputably would meet the "any discipline" test. Moreover, the Defendants' campaign of retaliatory harassment is plainly actionable under the "objectively chilling" standard, because it surely was sufficient to chill persons of reasonable firmness from continuing to freely exercise their right to speak on matters of public concern.[9] Indeed, not only was the campaign of harassment suffered by Ambrogio and Breaux more severe than the retaliation in *Bart, Piecynski, Walsh, Suppan,* and *Allen,* but if Breaux and Ambrogio had given in and

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[9] *See, e.g., Bart v. Telford,* 677 F.2d 622, 625 (7th Cir. 1982) ("campaign of harassment which though trivial in detail may have been substantial in gross" not insufficient as a matter of law to deter person of ordinary firmness from exercising right of free speech); *Piecynski,* 875 F.2d at 1336 (7th Cir. 1989) ("false accusations and petty humiliations, if orchestrated into a campaign of political retaliation, are actionable"); *Walsh v. Ward,* 991 F.2d 1344, 1345 (7th Cir. 1993) ("A campaign of petty harassment may achieve the same effect as an explicit punishment."); *Suppan,* 203 F.3d at 234-35 (3rd Cir. 2000) (campaign of retaliatory harassment including low evaluations, resulting in humiliation, stress, anxiety, loss of reputation, and sleeplessness, held sufficient "to deter a person of ordinary firmness" from exercising his First Amendment rights, even if the low evaluations caused no loss of promotion): *Allen,* 812 F.2d at 434 n.17 (9th Cir. 1987) ("While the individual incidents of verbal intimidation and abuse may seem insubstantial, we cannot say as a matter of law that the exercise of First Amendment rights was not deterred.").

quit, their surrender likely would have qualified as a "constructive discharge" that would have supported a First Amendment claim even under the Fourth Circuit's old "substantial equivalent of dismissal" test. An employee, however, should not have to quit in order to possess a First Amendment claim.

The Fifth Circuit's adverse employment action threshold requires public employees to make a substantially greater showing of severity than in any other circuit in the country. It is also the only circuit that focuses primarily on the form of governmental retaliation rather than on the substantive effect the retaliation has on public employees' free exercise of First Amendment rights. Because of the Fifth Circuit's arbitrarily restrictive approach, it is increasingly apparent that public employees in the Fifth Circuit have less First Amendment protection from retaliation for exercising core First Amendment freedoms than public employees anywhere else in the country. This Court should therefore resolve the conflict created by the Fifth Circuit's extreme approach to this fundamental First Amendment issue.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge the Court to grant a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Dated: May 19, 2000

APPENDIX

Allen BREAUX and Joe Ambrogio,
Plaintiffs-Appellees-Appellants,

v.

CITY OF GARLAND, et al., Defendants,

City of Garland, Defendant-Appellee,
Terry Hensley and Ron Holifield,
Defendants-Appellants.

No. 98-10638.

United States Court of Appeals,
Fifth Circuit.

Feb. 23, 2000.

Appeals from the United States District Court for the Northern District of Texas.

Before JONES and WIENER, Circuit Judges, and WALTER*, District Judge.

EDITH H. JONES, Circuit Judge:

This case involves the First Amendment retaliation claims of two police officers against the City of Garland ("City"), its former Police Chief, and its former City Manager. Officers Allen Breaux and Joe Ambrogio (the "Plaintiffs") argue that Terry Hensley and Ron Holifield (the "individual Defendants"), and later the City, violated 42 U.S.C. § 1983 by retaliating against the Plaintiffs for making public allegations of corruption in the Garland Police Department.

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* District Judge of the Western District of Louisiana, sitting by designation.

The jury found the individual Defendants liable, and even after a large remittitur was accepted by the Plaintiffs, the district court entered judgment exceeding $8 million, plus attorneys' fees, for the Plaintiffs. Both sides have appealed. We conclude that the judgment is fatally flawed because the Plaintiffs failed to prove that official retaliation against them was sufficiently serious to constitute a constitutional injury. No other reversible error has been raised.

I. FACTUAL BACKGROUND

This case is factually complex, as evidenced by the parties' continuing disagreement about what happened in the City of Garland and the Garland Police Department between 1992 and 1994. The following review of the facts is guided by the jury verdict favoring Breaux and Ambrogio. In the beginning of 1992, the City hired Holifield as its City Manager. The Garland City Council instructed Holifield to hire a new police chief from outside the department. Holifield ultimately hired Hensley, who started working for the City in April 1992. During the summer of 1992, Hensley contacted the FBI's Dallas office to discuss possible land acquisitions and flips made by members of the City administration.

In October 1992, Hensley met FBI Agent Largent, the supervisor of the white collar crime squad for public corruption, to discuss the land deals over lunch. Two other Garland police officers, Jody Lay ("Lay") and Larry Wilson ("Wilson"), were present at this meeting. During the conversation, it became clear that the FBI was beginning to investigate the possible involvement of some

current and former council members in two City of Garland real estate transactions. According to Wilson, Hensley conducted the meeting and told the FBI agent who and what Hensley wanted investigated. The subjects included former Garland mayor Billy Earl Tomlinson ("Tomlinson"); former City Councilman James Ratliff ("Ratliff"); and Garland Councilman Vernon Gaston ("Gaston").[1] Lay continued to assist the FBI until late 1992 when Officer Joe Harn ("Harn") took over for Lay. The FBI initiated a second investigation concerning possible Garland public corruption in relation to a landfill deal between the City and Waste Management, Inc., which was allegedly brokered by Ratliff and Gaston.

During the summer of 1992, Hensley put Lay in charge of the Intelligence Unit of the Department. Hensley told Lay that he was concerned about the current direction of the Unit as well as the performance of the two officers in the Unit. Hensley was particularly concerned with Breaux, who Hensley thought devoted too much of his time to Asian gangs. Lay apparently shared these concerns; in a September 11, 1992, memo to

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[1] According to the Plaintiffs, Ratliff, Gaston, and Tomlinson were all close friends and political allies. Wilson was also a good friend of Tomlinson. The Plaintiffs contend that Hensley instructed the FBI to investigate these individuals because they were "political enemies" of Hensley. The Plaintiffs also assert that Holifield played a significant role in the FBI investigation by acting as a "confidential informant" for the FBI. Holifield participated in the investigation at the request of the FBI, before he made the statements that serve as the basis for the Plaintiffs' § 1983 claim.

Hensley, Lay requested that Breaux be transferred out of the Intelligence Unit.

Breaux was then a 20-year veteran officer. Officer Breaux testified that he asked to be transferred back to patrol duty after Lay informed him, during a truck ride in the country, that Hensley and Lay "were redirectionalizing the Intelligence Unit to start doing political investigations for Charlie Hinton, the city attorney, and members of the city council."[2] Breaux was unwilling to engage in "political investigations" instituted by the new police chief. Although Breaux contemporaneously reported his conversation with Lay to Lieutenant David Swavey, he did not otherwise pursue the matter.

After being transferred out of the Intelligence Unit, Breaux remained on patrol duty until late 1993. In November 1993, Breaux received a poor performance review from his supervisor and was assigned to front desk duty at the Department.[3]

In the Spring of 1994, Officer Breaux, newly-elected vice-president of the Garland Police Officers Association

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[2] Lay contends that he went with Breaux to discuss Lay's recommendation in the memo. Lay maintains that during the ride he said only that the Unit would handle "high level 'public corruption' cases;" Lay denies any discussion of political investigations.

[3] Breaux's supervisor reported that Breaux would not adequately enforce traffic laws because Breaux questioned the legality of (1) requiring people to have driver's licenses and (2) confiscating weapons.

("GPOA"), told Detective Ambrogio, the GPOA president, about the previous attempt to recruit him for political investigations. Shortly thereafter, the GPOA conducted a survey of all Department employees to identify morale problems and to determine how to overcome any such problems. Upon learning of the survey, Chief Hensley became very upset and upbraided Ambrogio about it.

In March 1994, Holifield met with the GPOA Board to discuss the survey. During this meeting, Breaux first revealed to the City Manager the alleged illegal political investigations being run by Chief Hensley. Breaux also told Holifield that the station was wired so that a former police chief could monitor any telephone conversation in the building. The GPOA Board members were concerned that someone might try to monitor their calls after the results of the survey were published. After Breaux mentioned the alleged investigations, Holifield immediately ordered that any ongoing investigations were to remain confidential. Holifield also expressed his concern with GPOA tactics and allegedly threatened to "destroy" the GPOA if it acted "politically" with respect to these allegations or the survey results. But Holifield offered to work with the GPOA if the GPOA would keep politics out of the Department. With the apparent approval of Breaux and Ambrogio, Holifield agreed to investigate the GPOA allegations. Toward this end, Holifield reported the allegations to Hensley.

At this point, the retaliation began. Hensley informed Lay of the allegations of politically motivated investigations, and Hensley brought an Internal Affairs charge,

investigation I/A 94-12, against Breaux for making false statements – about the investigations.

Soon thereafter, Holifield discovered that film was missing from a secret camera, which had been installed in his office to catch suspected intruders. Realizing that police officers would recognize the hidden camera and knowing that the GPOA Board had been in his office for the March 1994 meeting, Holifield told Hensley about the missing film. Hensley initiated Internal Affairs investigation I/A 94-13 against all the GPOA Board members to determine if they had stolen the film.[4]

Detective Ambrogio, on the advice of a lawyer from the Combined Law Enforcement Association of Texas ("CLEAT"), then held a press conference, where he, the lawyer, and a City Councilman who was one of the targets of the alleged investigations, made expansive allegations about illegal political investigations being conducted by Hensley and Holifield.[5] Relying on statements made by Breaux during the meeting in Holifield's office,

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[4] After the March 1994 meeting in Holifield's office, Gaston admitted that someone had told him about the hidden camera, but Gaston refused to identify who it was. The investigation of all the officers present was narrowed to an investigation of Ambrogio for interfering with an investigation and revealing confidential information. Although the ensuing investigation failed to determine who stole the film, Ambrogio later admitted that he had made the unauthorized disclosure to Gaston.

[5] Ambrogio first received notice that he would be questioned in I/A 94-13 on April 18, 1994. After consulting with the CLEAT attorney, Ambrogio called the GPOA press conference on April 20, 1994.

Ambrogio and the others also alleged that the Department was conducting electronic surveillance of its employees since the phones in the Department were bugged. The CLEAT attorney, Bob Hasty, went so far as to inquire whether there is "in fact, a Gestapo type of . . . secret intelligence organization that is doing political investigations of police officers."[6] Hasty further propagated Breaux's allegations in letters to law enforcement authorities in the state. These public statements led to another Internal Affairs investigation, I/A 94-14, which focused on Ambrogio's possible violation of several General Orders of the police department. Investigators recommended that the charges in 94-14 be sustained and the Chain of Command Board agreed.

As part of the investigations, Breaux and Ambrogio were both questioned on several occasions, and Breaux was required to take a polygraph administered by the Department. The Internal Affairs investigations concluded that Breaux and Ambrogio had lied in making their allegations of corruption. Hensley publicly posted the results of the investigations in the Department and made the results available to several local media outlets, leading everyone in the department to know the Plaintiffs were "in trouble." Breaux was also required to undergo a

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[6] During the press conference, CLEAT and the GPOA requested an external investigation into the Department's activities. The Texas Rangers investigated Hensley's conduct in May 1994 and reported "a complete lack of evidence of wrongdoing on the part of Chief Hensley or his staff." At the request of Ratliff, the FBI also investigated Hensley's conduct. The FBI reached the same conclusion as the Texas Rangers.

psychiatric exam following comments he made to another officer while *en route* to the Department polygraph test.[7]

Following the various interviews, Internal Affairs investigations, and polygraphs, Breaux was placed on paid administrative leave. In May 1994, Hensley called each Plaintiff into his office separately, telling each that he could keep his job if he accepted a short suspension and signed a letter, the terms of which were to be mutually agreed to, retracting all of his allegations. Both men refused the agreement offered by Hensley. Hensley took no further action with respect to Breaux and Ambrogio.

Later in May, Ratliff was elected mayor of Garland. An ally of those whom Hensley had been investigating, Ratliff caused both Chief Hensley and City Manager Holifield to resign. In the few months following Hensley's resignation, the new Acting Police Chief Barnett "non-sustained" the Internal Affairs charges against Breaux and Ambrogio. Nevertheless, after returning from his paid administrative leave in July 1994, Breaux was assigned to the Telephone Response Unit ("TRU"). Breaux contends that Lay was a friend of Barnett's and that Barnett thought Breaux should be punished with this assignment. (According to the City, Breaux was assigned to the TRU, a position similar to the one he had at the front desk, in order to accommodate his shift preferences.) Breaux subsequently wrote to Barnett complaining about his assignment to the TRU and requesting a transfer back to patrol duty. Chief Barnett granted

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[7] Breaux told the officer that Breaux was surprised that someone had not already shot an Internal Affairs investigator between the eyes.

Breaux's request, and Breaux returned to patrol duty in November 1994.

Neither Breaux nor Ambrogio suffered a reduction in pay. Both remain employed by the City of Garland.

II. PROCEDURAL HISTORY

In October 1994, Breaux and Ambrogio filed suit against the City, Holifield, and Hensley alleging that the defendants were liable under 42 U.S.C. § 1983 for violating the Plaintiffs' constitutional rights to free speech and free association. Breaux also alleged that the City violated the Texas Whistleblower Act, Tex. Gov't Code Ann. § 554.001, et seq., by retaliating against him for reporting wrongdoing involving Holifield and Hensley. The case was removed from state to federal court.

Responding to serial motions for summary judgment by the City, the district court first held that the statute of limitations barred all of the Whistleblower Act claims except for Breaux's claim that his assignment to the TRU in July 1994 was in retaliation for reporting possible political investigations. Later, the district court granted summary judgment on the Plaintiffs' § 1983 claim against the City on the ground that Hensley and Holifield did not have "final policy-making authority" for the City with respect to "police officer employment decisions."

After a seven-day trial, the jury found Hensley and Holifield individually liable under § 1983, ordering actual damages against each defendant for each Plaintiff in amounts exceeding a half million dollars. Each individual Defendant was also ordered to pay $5,000,000 in punitive

damages to each Plaintiff. The City was found liable to Breaux under the Whistleblower Act for $527,500 in actual damages and $5,000,000 in punitive damages. The total award to both Plaintiffs amounted to $27,707,012.

The court entered judgment on the verdict but then responded to various post-judgment motions. The district court granted the City's Motion for Judgment as a Matter of Law on the Whistleblower Act claim, holding that Breaux had failed to exhaust his administrative remedies. The court also found that the jury's findings of lost earning capacity and part of the award to Breaux for lost past income were not supported by the evidence. The court accordingly reduced the actual damages, proportionally reduced the punitive damages, and required a remittitur from the Plaintiffs. The Plaintiffs accepted the remittitur. As a result, Breaux and Ambrogio were awarded, jointly and severally from the Defendants, $6,258.75 and $2,256 respectively for past lost income, and severally from each defendant $150,000 for lost reputation, $50,000 for mental anguish, and $2,000,000 as punitive damages. The Amended Judgment dismissed Plaintiffs' claims against the City with prejudice and awarded total damages in the amount of $4,406,258.75 to Breaux and $4,402,256 to Ambrogio, plus post-judgment interest, reasonable attorneys' fees, and expenses and costs.

Hensley and Holifield contend on appeal that (1) the Plaintiffs' speech is false or reckless as to its truth or falsity and therefore not constitutionally protected (or at least they reasonably could have believed it was unprotected), (2) neither Plaintiff suffered an adverse employment action, and (3) the damages are excessive. Breaux contends on cross-appeal that he did properly

exhaust his administrative remedies as required by the Whistleblower Act.[8]

III. ANALYSIS

A. Chief Hensley

The jury was persuaded that Breaux and Ambrogio became the objects of a vendetta by Chief Hensley and City Manager Holifield, once they blew the whistle on politically-motivated investigations of Garland City Council members by the City's top employees. No doubt the jury was powerfully influenced by the corroborating testimony of Wilson and Ratliff, who (in the wake of the officers' allegations) had become Chief of Police and Mayor, respectively.

This finding is, however, not the end of the matter. In order to establish a constitutional claim for retaliation against the exercise of one's First Amendment rights, four elements must be shown:

> First, the Plaintiffs must suffer an adverse employment decision. Second, the Plaintiffs' speech must involve a matter of public concern. Third, the Plaintiffs' interest in commenting on matters of public concern must outweigh the Defendants' interest in promoting efficiency. Fourth, the Plaintiffs' speech must have motivated the Defendants' action.

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[8] Other issues have been raised by the parties. We have considered them and conclude they are either meritless or subsumed by the dispositive issues.

Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir.1999) (citations omitted).

A major dispute between the parties throughout this litigation has persisted over whether Plaintiffs' allegations of corrupt political investigations by Hensley and Holifield were false, and if so, whether false or reckless allegations merit First Amendment protection. This complaint is answered on one level by the precise wording of the jury charge. In arriving at a verdict for the Plaintiffs, the jury was required by the court's charge to find the Plaintiffs' allegations true.[9]

Hensley and Holifield nevertheless continue to label the allegations bogus and to assert that false allegations of corruption are constitutionally unprotected, but neither they nor their opponents address what standard of review we must employ concerning the jury verdict. In this circuit, several opinions refused to determine the standard of review because of uncertainty as to whether First Amendment rights raise a legal question or a mixed

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[9] More problematic is that the court also submitted to the jury the critical second and third elements of the retaliation claim. The second and third elements of the test outlined above examine whether a public employee's speech deserves First Amendment protection by balancing the nature of the speech, i.e. its relation to matters of public rather than purely personal concern, against the need of government entities as employers to maintain a harmonious, efficient workplace. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). District courts in this circuit have been predisposed to submit claims in this fashion, but, insofar as the second and third elements are questions of law, this court has expressed its concern about the practice. *See Brady v. Fort Bend County*, 145 F.3d 691, 708 n. 7 (5th Cir.1998).

question of law and fact. *See Brady*, 145 F.3d at 708 n. 7 (citing cases). In one recent case, however, this court cited a de novo standard for First Amendment claims and then reversed a jury verdict favoring retaliation plaintiffs. *Harrington v. Harris*, 118 F.3d 359 365 (5th Cir.1997). As *Harrington* assumed arguendo that plaintiffs' speech was entitled to First Amendment protection, the offhand invocation of a *de novo* standard of review made no difference on that issue.

Like its predecessors, this opinion will not have to resolve the uncertainty over the standard of review, and the issue may be deferred again for a future panel. As in *Harrington*, we assume *arguendo* that the evidence supports the jury's finding that the Plaintiffs reported truthful allegations of public corruption in the police department. Truthful allegations of such a nature implicate matters of public concern.[10] The only question then remaining is whether Officers Breaux and Ambrogio suffered adverse employment actions after the March 1994

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[10] If the allegations of corruption are true, such allegations are matters of public concern and outweigh the government's interest in efficiency. *See Teague v. City of Flower Mound*, 179 F.3d 377, 381 (5th Cir.1999); *Brawner v. City of Richardson*, 855 F.2d 187, 191-92 (5th Cir.1988) ("The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department." (footnotes omitted)).

meeting with Holifield and the subsequent press conference when they spoke out.[11] *Harrington*, 118 F.3d at 365.[12]

Fifth Circuit caselaw, some of which post-dates the trial in this case, is inconsistent with Breaux's and Ambrogio's contention that they suffered actionable adverse employment actions. "Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Pierce v. Texas Dep't of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir.1994). Transfers can constitute adverse employment actions if they are sufficiently punitive, *see id.* at 1150, or if the new job is markedly less prestigious and

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[11] Defendants do not contest the fourth element of the retaliation claim identified in *Harris*. They acknowledge that Breaux and Ambrogio were subjected to various disciplinary actions because of their explosive allegations.

[12] The jury found that Plaintiffs were retaliated against for exercising their First Amendment rights of free speech and association. This court's analysis focuses on the Plaintiffs' freedom of speech claims but applies equally to the freedom of association claims: "When a plaintiff's claims arise under both freedom of speech and freedom of association, as in the case at bar, the freedom of association claims are analyzed under the same *Pickering* balance test used to determine the success of the freedom of speech claims." *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 444 (5th Cir.1999). In this circuit, *Harris* sets out the requirements for First Amendment retaliation claims generally. The only difference between the requirements for a retaliation claim predicated on free speech and one predicated on free association is that the latter "is not subject to the threshold public concern requirement." *Boddie v. City of Columbus, Mississippi*, 989 F.2d 745, 747 (5th Cir.1993). As a result, the Plaintiffs' freedom of association claims fail for the same reason as their freedom of speech claims, namely the absence of an adverse employment action.

less interesting than the old one, *see Click v. Copeland*, 970 F.2d 106, 110 (5th Cir.1992). This court has "declined to expand the list of actionable actions, noting that some things are not actionable even though they have the effect of chilling the exercise of free speech." *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir.1998) (citing *Pierce*, 37 F.3d at 1150). The reason for not expanding the list of adverse employment actions is to ensure that § 1983 does not enmesh federal courts in "relatively trivial matters." *Dorsett v. Board of Trustees*, 940 F.2d 121, 123 (5th Cir.1991). For example, in the education context, this court has held that " 'decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures,' while extremely important to the person who dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation." *Harrington*, 118 F.3d at 365 (quoting *Dorsett*, 940 F.2d at 123).

Given the narrow view of what constitutes an adverse employment action, this court has held that the following are *not* adverse employment actions: (1) mere accusations or criticism, *see Harrington*, 118 F.3d at 366; (2) investigations, *see Pierce*, 37 F.3d at 1150; (3) psychological testing, *see Benningfield*, 157 F.3d at 376; (4) false accusations, *see Colson v. Grohman*, 174 F.3d 498, 511 (5th Cir.1999); and (5) polygraph examinations that do not have adverse results for the plaintiff, *see Pierce*, 37 F.3d at 1150.

The foregoing legal framework makes clear why Breaux and Ambrogio have not suffered any adverse employment actions. Hensley ordered Internal Affairs investigations of Breaux and Ambrogio after they made allegations of illegal political investigations, but, as *Pierce*

and *Colson* hold, investigating alleged violations of departmental policies and making purportedly false accusations are not adverse employment actions. *See Pierce*, 37 F.3d at 1150; *Colson*, 174 F.3d at 511; *see also Benningfield*, 157 F.3d at 376. Hensley's requiring Breaux to undergo a psychological exam after Breaux's intemperate remark to a fellow employee also is not an adverse employment action. *See Benningfield*, 157 F.3d at 376. Although Breaux was placed on administrative leave from late April to July 1994, Breaux was paid while on leave and returned to his pre-leave position.[13] Thus, Breaux suffered no adverse action with respect to the leave. *See Benningfield*, 157 F.3d at 378 (plaintiff did not suffer adverse employment action when promotion was delayed two years in response to her exercising her free speech rights because she eventually received the promotion with retroactive pay and seniority). Similarly, any criticism, such as Hensley's oral threats or abusive remarks, does not rise to the level of an adverse employment action. *See Harrington*, 118 F.3d at 366.

More troubling are Chief Hensley's public posting of the findings of the Internal Affairs investigation and his attempt to get Breaux and Ambrogio to sign resignation letters. Although posting the results of the Internal Affairs investigation in the station may have comported with Departmental regulations, Hensley's disseminating

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[13] Breaux did not allege that his initial transfer out of the Intelligence Unit, made at his request, or his assignment to desk duty in November 1993 were retaliatory. It was not until March, 1994 that he first exercised his free speech rights by publicly alleging corruption.

that information to the media went "several steps beyond a criticism or accusation and even beyond a mere investigation" and was "punitive in a way that mere criticisms, accusations, and investigations are not." *Colson*, 174 F.3d at 512 n. 7. The reprimands went, at least temporarily, on Breaux's and Ambrogio's permanent records.

However, this court recognizes that a rescinded reprimand does not rise to the level of an adverse employment action: "[if] the reprimand was rescinded through internal [Houston Police Department] procedures . . . [it] does not constitute an adverse employment action." *Benningfield*, 157 F.3d at 377. After becoming Chief of Police, Barnett "non-sustained" the charges against Breaux and Ambrogio. The Plaintiffs contend that "an after-the-fact, unpublicized correction could not and did not undo the injury that Hensley's earlier reprimand caused." But the record does not indicate what employment injury the Plaintiffs have suffered. Breaux and Ambrogio are in a position similar to that of the law professors in *Harrington*. *See Harrington*, 118 F.3d at 366. Neither Plaintiff has been discharged from the Garland Police Department. Neither Plaintiff has been demoted, denied a promotion, suffered a reduction in pay, or lost seniority as a result of his speech. In fact, the only parties to the present suit who have lost their jobs are Hensley and Holifield. Thus, Chief Barnett's non-sustaining the charges through internal procedures precluded an adverse employment result.[14]

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[14] The Plaintiffs' concern with the publication of the Internal Affairs investigations to the media suggests that they want to import defamation into the adverse employment prong

The Plaintiffs also contend that Hensley's attempts to get them to recant their allegations constitute threats of discharge which, under *Harrington* and *Click*, are adverse employment actions.[15] However, *Harrington* and *Click* do not establish that a threat of discharge is itself sufficient to establish an adverse employment action. In summarizing the evidence, the *Harrington* court said only that "the evidence is clear that no Plaintiff has been discharged or threatened with discharge. . . . " 118 F.3d at 366. Not only was the court not defining the requirements for making out a successful retaliation claim under § 1983, but the court was explaining that the plaintiffs' retaliation claims must fail because the plaintiffs suffered no adverse consequences for exercising their speech rights.

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of their retaliation claim. But the Plaintiffs have not made a defamation claim, nor is defamation part of the present § 1983 action. Furthermore, this court has recognized that "[w]hen an employee retains his position even after being defamed by a public official, the only claim of stigma he has derives from the injury to his reputation, an interest that [*Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976),] reveals does not rise to the level of" a Fourteenth Amendment violation. *Moore v. Otero*, 557 F.2d 435, 437-38 (5th Cir.1977). Stigma by itself, without an impact on one's employment, does not constitute an adverse employment action. *See Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir.1995) ("We have applied the holding of *Paul* by requiring a section 1983 plaintiff to show stigma plus an infringement of some other interest." (citation omitted)).

[15] The other verbal criticisms that the Plaintiffs allege took place at the chain of command board hearings are not adverse employment actions. *See Harrington*, 118 F.3d at 366 ("mere criticisms do not give rise to a constitutional deprivation for purposes of the First Amendment.").

In *Click*, the court principally discussed whether transfers that were effectively demotions, as opposed to threats of discharge, were actionable. As the *Click* court stated, the government " '*may not deny a benefit* to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.' " 970 F.2d at 109 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)) (emphasis added). Some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable.[16]

Click also stated that "even the threat of discharge can be a potent means of chilling the exercise of constitutional rights." *Click*, 970 F.2d at 109. For this purpose, *Click* referred to the Supreme Court's analysis in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1737, 20 L.Ed.2d 811 (1968). *Pickering* does not, however, state that

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[16] *See also Bickel v. Burkhart*, 632 F.2d 1251, 1255 n. 6 (5th Cir.1980) ("impermissible retaliation [need] not result in the termination of his employment" in order to be actionable under § 1983, but the employer's actions must alter "*important conditions* of employment") (emphasis added). The record does not demonstrate that the alleged threat of discharge altered any important conditions of the Plaintiffs' employment. Hensley took no further action with respect to either Plaintiff after the Plaintiffs refused to sign the letters of retraction. Breaux was already suspended with pay, and the Internal Affairs investigations had already been completed. *Compare Fyfe v. Curlee*, 902 F.2d 401, 404-05 (5th Cir.) (transfer without loss in pay to menial, undemanding job is actionable under § 1983), cert. denied, 498 U.S. 940, 111 S.Ct. 346, 112 L.Ed.2d 310 (1990).

a threat of discharge alone will suffice for a First Amendment retaliation claim. The facts before the Court involved not a threat, but the actual dismissal of a teacher for writing a letter to a newspaper critical of the local school board. In the statement quoted above by *Click*, the Supreme Court was comparing dismissals of public employees with criminal sanctions and damage awards for defamation, two other devices that had been used to penalize the exercise of free speech rights – before the Supreme Court outlawed them.[17] Had the Court not spoken in *Pickering*, and prevented retaliatory dismissals for exercise of First Amendment rights, threats of dismissals could chill constitutional rights because they could be backed up. As the law stands now, retaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over a termination. *Pickering's* (and by extension, *Click's*) reference to threats of termination illustrated the problem if threats could be realized; the Court did not hold or imply that threats of termination alone, in a post-*Pickering* world in which retaliatory discharge is outlawed, would generate liability.

Breaux contends that his transfer to the Telephone Response Unit ("TRU") was similar to the transfer that was found in *Click* to be an adverse employment action. Although initially compelling, this argument is without merit on a closer look at the record. First, Breaux was

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[17] The Court ultimately declined fully to equate employee dismissals with constitutional rights in defamation cases, precisely because in the former, a balance must be maintained between the public interest in an orderly workplace and the discussion of issues of public concern.

assigned to the TRU by Barnett only after Hensley had been fired. The record does not show that Hensley caused Breaux to be transferred. Second, since Breaux was already on front desk duty, the transfer did not constitute a punitive action by the department. Although Breaux felt that the TRU was a step down, " 'a plaintiff's subjective perception that a demotion has occurred is not enough' to constitute an adverse employment decision." *Harris*, 168 F.3d at 221 (quoting *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir.1996)). At trial, Chief Wilson, the Plaintiffs' first witness, testified that the TRU assignment is not viewed as punishment in the Garland Police Department and that the TRU carries out an important function within the Department. Thus, since the transfer is not traceable to Hensley and is a position similar to front desk duty, the transfer does not constitute an adverse employment action.

Finally, the Plaintiffs argue that, even if the individual actions taken by Hensley do not constitute an adverse employment action, the aggregate of these actions constitutes a "vengeful vendetta" actionable under § 1983. For this idea, the Plaintiffs cite only *Thompson v. City of Starkville*, 901 F.2d 456 (5th Cir.1990), which observed: "Although it may be difficult to delimit exactly what conduct, in the abstract, violates a public employee's first amendment rights, a vengeful vendetta seeking an employee's job because of his speech on a matter of public concern surely falls within the ambit." *Id.* at 470. But *Thompson* is not as broad as the Plaintiffs suggest. The constituent acts and the final result of the vendetta were worse than most of the alleged retaliatory actions by

Hensley: The defendants accused the plaintiff police officer of committing a burglary, alleged that he threatened another officer, caused the plaintiff to be disciplined more severely than other officers for the same offense, and ultimately were instrumental in having him fired. *See id.* at 469.

Thompson is thus consistent with this court's holding in *Colson*. In *Colson*, this court evaluated when a campaign of retaliatory harassment amounted to an adverse employment action. To be actionable, "the campaign of retaliatory harassment [must] rise to such a level as to constitute a constructive adverse employment action." *Id.* at 514. The court explained "constructive adverse employment action" by reference to two cases. The court held that in *Sharp* the plaintiff was "constructively demoted . . . because the defendants created an 'intolerable situation' causing her to transfer to a less desirable position." *Id.* (quoting *Sharp v. City of Houston*, 164 F.3d 923, 934 (5th Cir.1999)). The *Colson* Court also relied upon *Benningfield*. 174 F.3d at 513. Although one plaintiff in *Benningfield* resigned as a result of a campaign of harassment, the court held that a reasonable person in her position would not have felt compelled to resign. Since Breaux and Ambrogio still have their jobs with the Department and have neither been demoted nor transferred to less desirable positions, they have failed to show that the Defendants' actions amounted to a constructive or actual adverse employment action.

B. City Manager Holifield

Despite Holifield's limited interaction with the Plaintiffs, the jury found Holifield liable under § 1983 for over $4 million in damages. On appeal, Holifield argues that there was insufficient evidence to show that, as required by the language of § 1983, he "cause[d]" the Plaintiffs to be subjected to First Amendment violations. As noted, whether the Plaintiffs alleged any adverse employment actions by Holifield is a question of law reviewed *de novo*. *See Harrington*, 118 F.3d at 365.

In "assessing an individual supervisor's liability under § 1983," this circuit applies the *City of Canton* standard of municipal liability. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir.1994) (en banc). Under this standard, a supervisor is liable under § 1983 only if (1) his conduct directly causes a constitutional violation or (2) the plaintiffs can show that the supervisor was "deliberately indifferent" to a violation of a constitutional right. *Id.* at 454 n. 8. (citing *City of Canton*, 489 U.S. 378, 388 n. 8, 109 S.Ct. 1197, 1204 n. 8, 103 L.Ed.2d 412 (1989)).

Holifield did not cause the Plaintiffs to suffer a violation of their First Amendment rights. His direct contact with the Plaintiffs was limited. During the March 1994 meeting with the GPOA Board members, Holifield threatened to "destroy" the GPOA if the group acted politically within the department. With the assent of Breaux and Ambrogio, Holifield referred Breaux's allegations of politically-inspired investigations to Hensley. Holifield also notified Hensley that film was missing from the hidden camera in his office and suggested that one of the GPOA Board members, who had recently met with him

there and could recognize the camera, might have stolen the film.

Internal Affairs investigations were commenced with respect to Breaux's allegations of corruption and the missing film. But, since neither of these investigations constitutes an adverse employment action, *see Benningfield*, 157 F.3d at 376, Holifield's role in initiating the investigations is not a sufficient "cause" to establish liability under § 1983. *See Heil v. Santoro*, 147 F.3d 103, 110 (2d Cir.1998) ("There being no First Amendment violation in investigating, the reason for the investigation created no material issue to be tried."). Similarly, Holifield's criticism of and threat to destroy the GPOA are not adverse employment actions. *See Harrington*, 118 F.3d at 366.

The result is the same if Holifield's conduct is viewed from the perspective of his supervisory role. Liability is imposed only if he was deliberately indifferent to subordinates' violations of the Plaintiffs' constitutional rights. Laying aside the question whether the city manager was a supervisor of anyone in the Police Department, the fact that Plaintiffs' First Amendment rights were not actually infringed exonerates Holifield from supervisory liability.

C. *The City of Garland*

1. Breaux's appeal

Breaux appeals the district court's summary judgment on his § 1983 claim against the City and post-verdict judgment as a matter of law on his Whistleblower Act claim. The district court granted summary judgment to

the City on all § 1983 claims, holding that no injury was caused by a municipal policymaker.

Because of a short limitation period under the Whistleblower Act, Breaux's state law claim against the City is based solely upon his transfer to the TRU for several months in 1994. The district court granted judgment as a matter of law on the Whistleblower Act claim because Breaux failed to exhaust his administrative remedies.[18] Breaux contends that exhaustion was not required because the police department's Internal Affairs process did not allow for complaints against the Chief of Police, but, in the alternative, he did file such a complaint. This court reviews the district court's judgment as a matter of law *de novo*. *Pierce*, 37 F.3d at 1149.

The exhaustion requirement of the Texas Whistleblower Act is jurisdictional and, therefore, mandatory and exclusive. *See Essenburg v. Dallas County*, 988 S.W.2d 188, 189 (Tex.1998) ("It is true that a plaintiff's failure to exhaust administrative remedies may deprive courts of subject matter jurisdiction in the dispute . . . [since] the exhaustion requirement seeks to assure that the appropriate body adjudicates the dispute – the hallmark of a jurisdictional dispute."). Moreover, the Whistleblower Act requires "the employee to utilize all procedures in place for resolving disputes at the governmental entity."

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[18] *See* Tex. Gov't Code Ann. § 554.006(a) (West 1994) ("An employee of a local government must exhaust that government's grievance or appeal procedures relating to suspension or termination of employment or unlawful discrimination before suing under this chapter.") (amended 1995).

Gregg County v. Farrar, 933 S.W.2d 769, 775 (Tex.App. – Austin 1996, writ denied). Contrary to Breaux's claim on appeal, the Internal Affairs process of the Garland Police Department is broad enough to encompass claims against the Chief of Police. Under General Order 76-29, the policy of Internal Affairs is to investigate "all complaints . . . of misconduct of employees who are sworn police officers." General Order 76-29. Misconduct is defined to include a violation of the general orders of the Department. In response to the City's motion for judgment as a matter of law, Breaux characterized his complaint as being "that Chief Barnett and his subordinates were retaliating against him by transferring him to the TRU for 'blowing the whistle' on Barnett's allies, Hensley and Jody Lay."[19] By alleging that the Chief of Police violated the Whistleblower Act, Breaux invoked both General Order 76-5, which subjects an officer to disciplinary action for violating state law, and General Order 76-29, which proscribes misconduct. The administrative remedy was available to Breaux.

Breaux argues, however, that the Internal Affairs process could not resolve complaints against the Chief of Police; filing a complaint with Internal Affairs would be futile since the Chief of Police determines whether an

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[19] In order to show that his complaint falls outside the scope of the Internal Affairs process, Breaux also characterizes his complaint as an "employment-related dispute." But if his complaint involved only an employment dispute, Breaux's complaint would not fall within the Whistleblower Act. Thus, in order to maintain an action under the Act, Breaux must allege a violation of state law by Chief Barnett – a claim that does fall within the purview of Internal Affairs.

investigation should be initiated and ultimately reviews the results. In support of Breaux's claim, Chief Wilson testified that, "I would think if an officer had an accusation to make against the chief of police, it might be appropriate to go outside the Internal Affairs unit to do that . . . [T]here's no guide book that says if you're going to accuse the chief of police of something follow steps one, two and three."

The district court rejected Breaux's argument. Texas courts have recognized a futility exception to exhaustion requirements in only a limited number of circumstances. *See, e.g., Town of Sunnyvale v. Mayhew,* 905 S.W.2d 234, 246 (Tex.App.1994), *rev'd on other grounds,* 964 S.W.2d 922 (Tex.1998); *Methodist Hosps. of Dallas v. Texas Workers' Compensation Comm'n,* 874 S.W.2d 144, 149-50 (Tex.App. 1994, no writ). Since no Texas court has applied a futility exception to statutory, jurisdictional exhaustion requirements, the district court refused to "enlarge existing state law by adopting a futility exception to the Whistleblower Act's exhaustion requirement." This court also refuses to create a futility exception under such circumstances.

The purposes of the exhaustion requirement are to give the employer notice of a grievance and a chance to resolve it. As the Texas Supreme Court recently noted, the exhaustion requirement demonstrates the legislature's "will to have the agency resolve disputed issues of fact and policy." *Essenburg,* 988 S.W.2d at 189. The fact that the Act allows an employee to file a civil suit if the employer has not resolved his complaint in 30 days shows that "the legislature intended that the governmental entity should be afforded the opportunity to correct its own errors by

resolving disputes before being subjected to the expense and effort of litigation." *Farrar*, 933 S.W.2d at 775.

Even if the Department's procedures for filing a grievance against the Chief of Police were unclear, the exhaustion requirement still serves a notice-giving function. Texas courts have recognized a futility exception only in cases where it was impossible for the governmental agency to address an issue, *e.g.*, the constitutionality of a statute.[20] But here, requiring notice even if the available grievance procedures are not clearly delineated would have enabled the City either to develop a record for judicial review on fact questions (if not to resolve the dispute about the transfer) or possibly to mitigate Breaux's damages by transferring him out of the TRU sooner. To repeal exhaustion when grievance procedures are ambiguous would eliminate the notice-giving effect of the Act's exhaustion requirement, which has been held to supersede general presentment requirements.[21] *Id.* at 773. Furthermore, requiring an employee

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[20] The cases Breaux cites as examples of exceptions to the exhaustion requirement involved situations where there clearly was no way for the agency involved to provide relief. *See Texas State Bd. of Pharmacy v. Walgreen Texas Co.*, 520 S.W.2d 845 (Tex.Civ.App.1975) (agency powerless to determine constitutionality of statutes); *City of Austin v. Phipps*, 162 Tex. 112, 344 S.W.2d 673 (1961) (Civil Service Commission given no jurisdiction over denial of injury leave of absence); *Birdville Indep. Sch. Dist. v. First Baptist Church*, 788 S.W.2d 26 (Tex.App. – Fort Worth 1988, writ denied) (agency powerless to decide constitutionality of statute). As discussed above, this is not the case in the present action.

[21] Even if the grievance procedure is ambiguous with respect to filing complaints against the Chief of Police, Texas

to exhaust his remedies, which could delay a civil suit by only 30 days, is hardly onerous or unfair.

In any event, the premise of Breaux's argument for the futility of exhaustion appears incorrect. General Order 76-29 permits Internal Affairs to investigate all complaints against *any* sworn police officer, thus including the Chief of Police. Under General Order 76-29, an officer can complain of misconduct to any supervisor, and "the complainant should be referred to Internal Affairs directly if possible." General Order 78-61 provides for a line of succession in command if the Chief of Police is determined to be incapacitated because, *e.g.*, the Chief is recused from a matter due to a conflict of interest. As a result, the Internal Affairs process is equipped to handle a complaint against the Chief of Police or, at least, to provide the Department and the City with notice of an employee's potential claim. Because the Internal Affairs regulations do not preclude a complaint against the Chief and indeed contemplate the necessity of circumventing

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case law suggests that an employee is not exempt from the need to notify his employer that the employee is about to file a Whistleblower claim in court. Under the Act, when "it is unclear whether the employer has a post-termination grievance procedure, or it is unclear what the procedure is and when . . . the terminated employee [timely] notifies the employer that he is invoking that employee's grievance procedure, informing the employer that it has 30 days in which to conclude the grievance procedure," the employee would meet the statute of limitations provision in the Act. *Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 724 (Tex.App. – Houston [1st Dist.] 1995, writ denied). Since the limitations period is tolled by a proper invocation of grievance procedures, this holding speaks directly to exhaustion.

the Chief, and because the exhaustion requirement advances Texas' concern with giving employers notice, a futility exception to the Whistleblower Act exhaustion requirement is inappropriate.

Finally, Breaux contends that his letter to Chief Barnett, entitled "Request Consideration for Transfer," effectively initiated the Internal Affairs process for exhaustion purposes. General Order 76-29 provides that an officer's complaint may be "initiated by submitting a written memorandum to the Director of Police Services requesting an investigation and detailing the conduct being complained about." Breaux's letter stated that (1) he "was ordered into the TRU, against [his] will," (2) he "did not request assignment to this position," and (3) "the transfer was directly related to dictates of a previous police administrator." Breaux neither provided any details about retaliatory conduct nor requested an investigation into the transfer. At most, he requested that a written explanation be given if his request for a transfer were denied: "I am not aware of any reasons that would prohibit me from this requested transfer to an enforcement position in patrol; but if any exist, I would appreciate being advised in writing so that the issue could be confronted and resolved."[22] His letter was insufficient to

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[22] In his letter to Chief Barnett, Breaux asked permission "to transfer back to the uniform patrol division during the next seniority selection process" in the fall of 1994. Barnett granted Breaux's request, and Breaux returned to patrol duty in November 1994.

state a complaint under General Order 76-29 or to exhaust under the Whistleblower Act.[23]

2. Ambrogio's appeal

Ambrogio appeals only the taxing of some of the City's costs against him. In its May 8, 1998, Amended Judgment, the district court dismissed all claims against the City and taxed 40% of the City's costs of court against Ambrogio. This court reviews a district court's award of costs for an abuse of discretion. *Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir.1991).

The taxation of costs is allowed "as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d)(1). In this case, the City clearly prevailed against Ambrogio. None of Ambrogio's claims against the City went to the jury, and he does not appeal the district court's pretrial dismissal of those claims. On appeal, Ambrogio does not explain how the district court abused its discretion in apportioning costs against him.

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[23] The case Breaux cites for broadly construing his alleged complaint is distinguishable. In *Farrar*, the court found that a letter complaining of a demotion "without just cause" was sufficient to provide notice that the complaint was about "retaliatory employment practices." *Farrar*, 933 S.W.2d at 774. But Farrar, unlike Breaux, had written a letter specifically to a grievance committee, initiating a committee hearing about Farrar's demotion.

IV. CONCLUSION

The police officers failed to make out a First Amendment retaliation claim. Even though they persuaded the jury, and we have assumed, that they truthfully spoke out to reveal political investigations of public officials, the exercise of First Amendment rights is not enough. The retaliation they complained of – investigations, criticisms, public (but withdrawn) reprimands, psychological and polygraph testing, suspension with pay, transfer to the TRU – do not, either individually or collectively, constitute adverse employment actions. The actions taken by Hensley and Holifield did not give rise to § 1983 liability. For reasons previously explained, we have rejected the other issues raised on appeal.

This court reverses the judgment for the Plaintiffs on their § 1983 claims against the individual Defendants and renders a take-nothing judgment against the Plaintiffs on these claims. We affirm the district court's dismissal of the City as a Defendant and the taxing of costs against Ambrogio.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALLEN BREAUX and JOE AMBROGIO,	§	
Plaintiffs,	§	Civil Action No.
VS.	§	3:94-CV-2291-D
THE CITY OF GARLAND, TERRY HENSLEY, and RON HOLIFIELD,	§	
Defendants.	§	

AMENDED JUDGMENT

(Filed May 8, 1998)

In this civil action, the court granted summary judgment in part in favor of defendants The City of Garland, Texas (the "City"), Terry Hensley ("Hensley"), and Ron Holifield ("Holifield") in memorandum opinions and orders filed September 11, 1995 and October 14, 1997. Thereafter, the parties tried to a jury plaintiff Allen Breaux's ("Breaux's") claim against the City alleging a violation of the Texas Whistleblower Act, and plaintiffs Breaux's and Joe Ambrogio's ("Ambrogio's") claims against defendants Hensley and Holifield, pursuant to 42 U.S.C. § 1983, alleging violations of plaintiffs' First Amendment rights. The court filed a judgment on November 12, 1997 awarding relief in accordance with the memorandum opinions and orders filed September 11, 1995 and October 14, 1997, a memorandum opinion filed November 12, 1997, and the jury verdict.

Thereafter, the City filed a motion for judgment as a matter of law, motion to alter or amend the court's final judgment, and motion for new trial or for an order of remittitur; Hensley filed a renewed motion for judgment as a matter of law and motion for new trial, for remittitur, and/or to alter or amend judgment; Holifield filed a renewed motion for judgment as a matter of law, for new trial, for remittitur, and/or to alter or amend judgment; and plaintiffs Breaux and Ambrogio filed a motion to amend judgment, and motion for recovery of attorney's fees and related expenses. The court decided those motions by memorandum opinion and order filed April 17, 1998. It denied Hensley's and Holifield's motions for new trial as to damages, conditioned on Breaux's accepting a remittitur of $321,241.25 ($279,500 + $41,741.25) in actual damages, and Ambrogio's accepting a remittitur of $360,000 in actual damages and $3 million in punitive damages. Breaux and Ambrogio filed their remittitur on May 7, 1998.

For the reasons stated in its prior memorandum opinions and orders, and plaintiffs' having filed their remittitur, the court enters judgment as set forth below.

I

It is ordered and adjudged that plaintiffs' claims against the City are dismissed with prejudice.

The taxable costs of court incurred by the City are assessed 60% against Breaux and 40% against Ambrogio.

II

It is ordered and adjudged that Breaux recover judgment from Hensley and Holifield, jointly and severally,

1. in the principal sum of $6,258.75; and

2. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum.

III

It is ordered and adjudged that Breaux recover judgment from Hensley

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

IV

It is ordered and adjudged that Breaux recover judgment from Holifield

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

V

It is ordered and adjudged that Ambrogio recover judgment from Hensley and Holifield, jointly and severally,

1. in the principal sum of $2,256.00; and

2. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum.

VI

It is ordered and adjudged that Ambrogio recover judgment from Hensley

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

VII

It is ordered and adjudged that Ambrogio recover judgment from Holifield

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

VIII

It is ordered and adjudged that Breaux and Ambrogio recover from Hensley and Holifield, jointly and severally, attorney's fees and expenses in the sum of $361,681.56.

IX

The court dismisses the remainder of plaintiffs' claims with prejudice. All relief not expressly granted by this judgment is hereby denied.

Done at Dallas, Texas this 8th day of May, 1998.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

Constitutional And Statutory Provisions Involved

U.S. Const., Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.